No. 20,358

United States Court of Appeals

For the Ninth Circuit

FLYING TIGER LINES, INCORPORATED, and EMPLOYERS MUTUAL LIABILITY INSURANCE COMPANY OF WISCONSIN,
Appellants,

vs.

DAVID R. LANDY, Deputy Commissioner for the 13th Compensation District, and PETER GREGORY THOMAS, MAUREEN ALTAIR THOMAS, and TERRY AVA THOMAS, Minor Children of Gregory Peter Thomas, Deceased,
Appellees.

On Appeal from the United States District Court for the Northern District of California

APPELLANTS' RESPONSE TO DEPUTY COMMISSIONER'S SUPPLEMENTAL REPLY MEMORANDUM

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Pursuant to request of the Court a supplemental memorandum has been filed in support of the decision

of the deputy commissioner and the Court below. This supplemental memorandum was directed solely to the failure of the deputy commissioner to give the carrier full credit for the amount of the state commission award, when that award had been paid in full by the carrier.

Additional time was granted to appellants within which to prepare and file a response to the deputy commissioner's supplemental memorandum. Our response follows.

A. THE SUPPLEMENTAL MEMORANDUM OFFERS THE SPURIOUS CONTENTION THAT SINCE CREDIT HAS NEVER PREVIOUSLY BEEN ALLOWED IN EXCESS OF AMOUNTS PAID IN OTHER CASES, THIS IS PROBATIVE OF SOMETHING.

The argument answers itself, since the point is admittedly one of first impression (see lines 1-3 under "Statement" at page 1 of the supplemental memorandum). Since there has never heretofore been an occasion for requesting credit for an amount greater than actually paid, why in the name of common sense should it be "significant" that "no reported case has ever allowed" such a credit. Obviously, the contention falls of its own weight since it is clear that neither commissioner nor Court could ever allow credit for an amount exceeding that which had been requested.

B. IN THE INSTANT CASE, COUNSEL FOR THE APPELLANTS (PLAINTIFFS) EXPRESSLY REQUESTED CREDIT FOR THE FULL $17,500.00 WHICH HAD BEEN SATISFIED BY THE CARRIER THROUGH PAYMENT IN CONFORMITY WITH STATE COMMISSION ORDERS.

The record shows that the award of the state commission was in the amount of $17,500.00; and that it was satisfied by the carrier, not only in full, but expressly in conformity with the orders of the commission itself. This was not a voluntary payment on the carrier's part, nor one to which it agreed. The lump sum payment was sought by the respondents Thomas, it was a matter of formal determination by the state commission, and the carrier was obliged, like it or not, to make payment in accordance with the commission's order.

When the carrier was forced to re-litigate the whole matter once more before the deputy commissioner, its counsel caused the record to show the orders of the state commission and its payments thereunder, and made it very plain to the deputy commissioner that the carrier was requesting credit for the full $17,500.00 which it had satisfied by its compulsory compliance with commission orders.

The supplemental memorandum offers the novel suggestion that the carrier "allowed the hearing to be closed without any attempt whatever to request approval of commutation by the deputy commissioner and the Secretary". Having set up this "straw man", the memorandum proceeds to demolish it with the argument that "appellants cannot obtain from the courts relief they did not ask before the deputy commissioner."

Such a contention presupposes that the only way that the carrier could obtain credit for the full $17,500.00 for which it was liable under the state award, would have been to take the initiative in requesting the deputy commissioner to grant a lump sum payment. In our view, such a contention begs the question. The carrier did not then, nor does it now, concede that the deputy commissioner even had jurisdiction of the case, let alone asking him to grant a commutation covering a payment which it had already been compelled to make in another jurisdiction to the same respondents.

To drag in the idea that federal credit could only be granted via the federal commutation route is, as we view the matter, purely a non-sequitur. Either the carrier was entitled to full credit, or it was not, and the question of a commutation never entered anybody's mind at that time, least of all the deputy commissioner's. The contention is in the nature of a convenient afterthought to find support for an indefensible failure to grant full credit.

C. PRECEDENT REQUIRES THAT THE CARRIER BE GRANTED CREDIT BY THE DEPUTY COMMISSIONER FOR PAYMENT UNDER THE STATE AWARD, AND THE RECORD HERE SHOWS THAT THE CARRIER WAS OBLIGATED FULLY TO SATISFY THE STATE AWARD OF $17,500.00.

It is well settled that the carrier is entitled to credit by the deputy commissioner when it has been obliged to make payment under the state award. *Lawson v. Standard Dredging Co.,* 134 Fed. 2d 771. It was

originally contended before the District Court that "credit is given for actual payment . . . not for the mere award which might never in fact be paid." As we have hitherto pointed out, this is a contention which might be raised in regard to an unpaid award; it cannot apply where, as here, the state award has been fully paid.

But it is now argued by the supplemental memorandum that credit for the full $17,500.00 of liability discharged by the carrier under the state award could not be granted because payment of that amount had not actually been "made", nor had the smaller commuted value been approved by the deputy commissioner. We have heretofore suggested that the matter of commutation approval by the deputy commissioner is in the nature of a "red herring". It is the carrier's position the payment of the full $17,500.00 was in fact made by the carrier, partially in cash and partially in the form of prepaid interest. Exactly what the carrier was obliged to pay under the state award was fully reflected by the record, and therefore was before the deputy commissioner by reason of the request for full credit. He should not have disregarded it as he clearly has done.

D. THE NET RESULT OF THE FAILURE TO GRANT FULL CREDIT, IF PERMITTED TO STAND, WILL BE TO GIVE THE RESPONDENTS THOMAS A DOUBLE RECOVERY.

This Court can take judicial notice of the fact that cash payable in a lump sum is always worth more than the same amount paid in installments over a future period of time. The difference in present value and installment payments is measured by statute at 3% under the California law and 4% under the federal statute. When the carrier was compelled to pay forthwith a liability not then due under the original award or the law itself, it was obliged to surrender the use of funds on which it could have and would have been able to gain at least the difference between its full liability of $17,500.00 and the cash payment actually made.

The point is that the carrier, had it not been forced by the demand of the respondents Thomas for a commutation and the granting of that demand by the state commission, would have had the equivalent of more than $17,500.00; for it would most certainly have realized more than the 3% interest involved in making such a lump sum payment. Conversely, the respondents Thomas, if permitted to retain the advance payment which the carrier was compelled to make under the state's commutation order, are gaining a double recovery. By the state order, they gain the cash; by the federal order they also gain the interest on the use of the money. This is a simple form of double recovery, and comes under the head of eating one's cake and having it too, with the deputy commissioner's able assistance.

The supplemental memorandum has much to say about acting in the "interest of justice." In the carrier's view, technicalities are being invoked to avoid a disposition on that basis through failure to grant the full credit expressly requested on behalf of the carrier and amply justified by the facts in the record.

CONCLUSION

The supplemental memorandum is replete with citations dealing with federal commutations, a subject which, in our view, is irrelevant to the problem before the Court. If we are correct, the citations are equally irrelevant.

We urge that the motion for summary judgment and for a dismissal of our complaint be denied, and that the order and award of the deputy commissioner be vacated, annulled and set aside.

Dated, San Francisco, California,
August 30, 1966.

HANNA & BROPHY,
Attorneys for Appellants.